88-1158

SUPREME COURT, U.S.
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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

MARCOS J. PEREZ,
Petitioner,

and

SEAN BURKE,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

1. Whether Connecticut's Youthful Offender Statutory Scheme, which provides special protections for youths 16 to 18 years of age, who are charged with crimes not classified as Class A felonies by Connecticut law, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF CONNECTICUT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioners respectfully pray that a writ of certiorari issue to review

the order for the Supreme Court for the state of Connecticut entered in this proceeding on November 1, 1988.

OPINIONS BELOW

The Connecticut Supreme Court issued its order dismissing the Petitioners' appeal for lack of a final judgment on November 1, 1988. That order is represented in Petitioners' appendix.

The trial courts opinion denying youthful offender status to both Petitioners was issued on July 22, 1988 and is reprinted in Petitioners' appendix. Excerpts from a hearing dated July 15, 1988 on youthful offender eligibility for Petitioner are also reported in Petitioners' Appendix.

JURISDICTION

The order of the Connecticut Supreme Court dismissing the Petitioners' appeal was rendered on November 1, 1988. The Petition for a writ of certiorari was filed within sixty

(60) days of the order. This Courts' jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce law which shall abridge the privilege and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 1, 1988, warrants were issued for the arrest of Marcos J. Perez and Sean Burke (hereinafter "Petitioners") for felony murder in alleged violation of Connecticut General Statutes (hereinafter "C.G.S.") Section 53a-54(c) and robbery in the first degree in alleged violation of C.G.S. Section 53a-134. On June 6, 1988, a second warrant was issued for the arrest of the Petitioners for robbery in the first degree in alleged violation of C.G.S. Section 53a-134, and unlawful restraint in the first degree in alleged violation of C.G.S. Section 43a-95, and assault in the third degree in alleged violation of C.G.S. Section 53a-61, and larceny in the third degree in alleged violation of C.G.S. Section 53a-124. The warrant for the arrest of Petitioner-Burke also alleged that he committed threatening in violation of C.G.S. Section 53a-62.

On June 20, 1988, each Petitioner filed a Motion for Investigation of Eligibility to be Adjudged a Youthful Offender (with an attached memorandum) pursuant to C.G.S. Section 54-76c. On July 15, 1988, in a closed hearing before the Honorable M. Morgan Kline, the Petitioners argued in support of their motion. In addition, Judge Kline reviewed the investigative report of the Petitioners' background, which had been conducted by the Office of Adult Probation pursuant to C.G.S. Section 54-76d(a).

At the request of Judge Kline, a hearing was held in chambers on July 19, 19888. See Appendix C, p. C-2. Both of the Petitioners' attorneys and the State's Attorney were present. Id. A discussion was held as to a method of procedure in this case that would accommodate the substantive and procedural problems of the youthful offender statutory scheme. See Appendices D and E at D-3 and

E-3. As a result of this conference, each Petitioner executed a Stipulation and Waiver under Seal on July 22, 1988. See id.

In the July 22, 1988 youthful offender hearing, Judge Kline determined that the Petitioners were ineligible to be adjudged as youthful offenders, commenting,

> "[i]t is my feeling in order to properly comport with the statute I have to make the determination today as to what status should be granted...the acts in both files, one being a murder, taking of a life, and the other being a rather severe assault and robbery first degree with a threat being made, with a display of a knife and other things occurring, the crimes are severe enough that not even young men not of tender years but lesser years, should know better."

See Appendix C, pp. C-9, C-10.

Both Petitioners took a timely exception from the denial of their application for youthful offender status. See Appendix C, p.

C-13. Each Petitioner filed an appeal to the Appellate Court on August 10, 1988. Petitioners filed a Motion to Consolidate Appeals on August 15, 1988 and on September 9, 1988, the Motion was granted. In addition, each Petitioner properly requested that the case be transferred to the Connecticut Supreme Court, and on September 8, 1988, the Connecticut Supreme Court accepted the appeal.

On November 1, 1988, after oral arguments, the Connecticut Supreme Court dismissed the appeals for lack of a final judgment.

REASONS FOR GRANTING THE WRIT

THE CONNECTICUT SUPREME COURT DISMISSED THE PETITIONERS' APPEAL FOR LACK OF A FINAL JUDGMENT WHICH PRECLUDES CONSTITUTIONAL REVIEW OF THE STATUTE RESULTING IN REPEATED VIOLATIONS OF CONSTITUTIONAL RIGHTS.

ARGUMENT

THE CONNECTICUT YOUTHFUL OFFENDER STATUTORY SCHEME VIOLATES THE DUE PROCESS CLAUSE OF THE

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT: (1) ELIGIBILITY IS DETERMINED PARTLY FROM THE SERIOUSNESS OF THE CRIME CHARGED; AND (2) ELIGIBILITY IS PRECLUDED FOR YOUTHS CHARGED WITH CLASS A FELONIES, AND THEREFORE, IS NOT RATIONALLY RELATED TO ITS PURPOSE.

Connecticut's Youthful Offender Act, 1971 P.A. 72, Senate Bill 947, was patterned after New York's Code of Criminal Procedure, Section 913e-913r,[1] and became effective October 1, 1971. See

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[1]Subsequently, the New York Youthful Offender Act was held unconstitutional by the New York Court of Appeals. See People v. Drummond, 40 N.Y.2d 991, 391 N.Y.S.2d 67 (1976). In declaring the act as unconstitutional, the Drummond Court concurred with the dissenting opinion of Justice Rabin in People v. Santiago, 51 A.D.2d 1, 379 N.Y.S.2d 843 (1975). See Santiago, 51 A.D.2d at 14-16, 379 N.Y.S.2d at 857-59 (Rabin, J., dissenting). The New York legislature followed by amending the youthful offender act and required that youthful offender status be determined upon conviction of the underlying charges. See N.Y. Crim. Proc. Law Section 720.10 et seq. (McKinney 1988).

Conn. Gen. Stat. Sections 54-76b et seq. When a defendant is adjudged as a youthful offender, the defendant is entitled to a private trial, to have all records sealed, to be segregated before trial from other defendants over the age of eighteen, to be free of criminal liability, to be sentenced as a youthful offender and not as an adult, and to have all records erased when he reaches twenty one years old. See id. The scheme envisioned by the Youthful Offender Act is the avoidance of stigma and the practical and collateral consequences attendant upon conviction. See People v. Plath, 71 N.Y.S.2d 667, 668 (1947). The court in Plath, as articulated by the Connecticut House of Representatives, 1971 P.A. 72, Senate Bill 497, House at 1232, referred to the Youthful Offender Act as a humane and progressive piece of legislation with the intent to benefit a youth who makes a first mistake and ought not to be branded as a criminal forever.

As recognized by the Connecticut Supreme Court in State v. Bell, 179 Conn. 98, 425 A.2d 574 (1979) "[s]ubsequent criminal proceedings, no matter what the eventual outcome, cannot regain for the defendant the privacy lost through the denial of his application and consequent public trial." Id. at 99. Thus, a denial of a youthful offender application causes irreparable harm to an accused which cannot be replaced by a favorable decision from an appeal after conviction.

The Connecticut Supreme Court dismissed the Petitioners' appeal for lack of a final judgment. In their appellate brief, the Petitioners argued that
the statute, as applied, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Nevertheless, the Supreme Court refused to address this issue.

A defendant who is denied the protections of the youthful offender statute and who is subjected to a public trial has no remedy for an appeal after a disposition is rendered from the public trial. The damage from the public trial has already been incurred. Therefore, such a defendant is highly unlikely to appeal the constitutionality of the statute and the unconstitutional statute remains in force with repeated violations of constitutional rights occurring.

The Petitioners contend that the Connecticut Youthful Offender Scheme violates the fundamental fairness which is mandated by the Due Process Clause in that: (1) eligibility is determined partly from the seriousness of the crime charged; See Connecticut General Statutes §54-76d(b) and Appendix C-6; and (2) eligibility is precluded for youths charged with Class A felonies. See Connecticut General Statutes §54-76(b).

Determining the eligibility for a statutory right on more unproven allegations from a prosecutors' indictment offends reasonable motions of fairness. See People v. Santiago, 51 A.D.2d 1, 379 N.Y.S. 2d 843, 858 (1975) (Rabin, J. directing). "It is clear that an indictment does not survive a trial and verdict; it should play no part in determining the type of post-conviction treatment accorded to youngsters otherwise eligible for youthful offender consideration." Id. (emphasis added). Furthermore, such a scheme allows for prosecutorial manipulations -- elevation of the severity of the crime or crimes charged -- in an effort to preclude eligibility for youthful offender status.

The law as applied, is not rationally related to its purpose. The purpose is for the protection of youths from the damages of a public trial. However, the law presently allows the prosecution to circumvent that

purpose by charging an otherwise eligible youth with a more serious crime so as to prevent the youth from obtaining the benefits of that statute. Therefore, the law as it exists, serves no legitimate or nonillusionary state purpose resulting in a violation of Due Process.

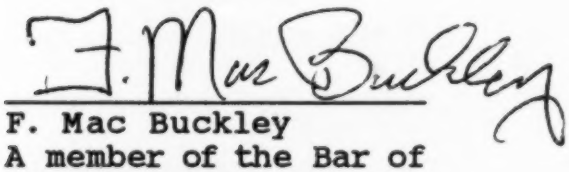
CONCLUSION

Connecticuts' Youthful Offender statutory scheme violates fundamental fairness which the Due Process Clause provides in that the main criteria for determining eligibility is the seriousness of the crime charged. This allows for prosecutorial manipulation by charging a more serious crime to prevent a youth from obtaining the protections for which the statute is designed.

The Connecticut Supreme Courts dismissal of the Petitioners' appeal for lack of a final judgment will only perpetuate the constitutional violations which continue to exist. Defendants who are denied youthful offender status will not appeal the constitutionality of the statute after conviction from a public trial as the protections of the statute are irretrievable. Therefore, this Honorable Court should grant this Petition for Certiorari to determine the

constitutionality of Connecticuts' Youthful Offender Act.

Respectfully submitted,
The Petitioner
Sean Burke



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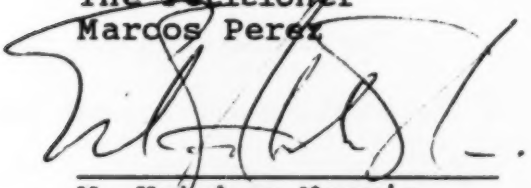

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